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## Indirect Gag Orders and the Doctrine of Prior Restraint

Sheryl A. Bjork

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# COMMENT

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"Freedom of the press is not restricted to the operation of linotype machines and printing presses. A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure."<sup>1</sup>

### I. INTRODUCTION

The dissonance between the right to a fair trial and the freedom of the press strikes a familiar, albeit disharmonious, chord. A brief

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1. *In re Mack*, 386 Pa. 251, 273, 126 A.2d 679, 689 (Musmanno, J., dissenting), cert. denied, 352 U.S. 1002 (1956).

glance at history demonstrates the perpetual conflict between these equally dynamic concepts.<sup>2</sup> On the one hand, judges endeavor to protect the rights of the criminally accused against potentially prejudicial interference by the press.<sup>3</sup> On the other hand, the press<sup>4</sup> seeks to preserve its reportorial role via the right to free expression.

The United States Constitution fortifies both fair trial and free press concerns. While the sixth amendment mandates that "an impartial jury"<sup>5</sup> shall judge the criminally accused, the first amendment forbids the government from "abridging the freedom of speech, or of the press."<sup>6</sup> Although the amendments do not conflict on their face, in practice, their confrontation precipitates heated debate to determine the priority of the underlying rights.<sup>7</sup>

The judiciary has not responded casually to this constitutional contest. Trial judges, with an eye toward protecting the defendant's right to a fair trial, frequently issue orders restricting the extrajudicial speech of trial participants.<sup>8</sup> These "gag" orders typically prohibit

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2. For a summary treatment of some of the most publicized cases in American history, see J. LOFTON, *JUSTICE AND THE PRESS* 71-110 (1966).

3. In 1807, defense counsel in the treason trial of Colonel Aaron Burr argued that prejudicial publicity had infected the jurors' minds. *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g). Chief Justice Marshall agreed, stating that "[t]he jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions." *Id.* at 50. A century later, Justice Holmes stated that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454, 462 (1907).

4. This Comment uses the terms "press" and "media" interchangeably to include the various forms of publication such as newspaper, magazine, radio, and television.

5. U.S. CONST. amend. VI. The sixth amendment right to an impartial jury also applies to state criminal defendants through the due process clause of the fourteenth amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); see also *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("The failure to accord an accused a fair hearing violates even the minimal standards of due process.").

6. U.S. CONST. amend. I. Incorporation of the first amendment into the fourteenth amendment requires that first amendment restrictions apply with equal force to the states. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.").

7. See *Bridges v. California*, 314 U.S. 252, 260 (1941) ("[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.").

8. See *In re New York Times Co.*, 878 F.2d 67 (2d Cir. 1989); *In re Dow Jones & Co.*, 842 F.2d 603 (2d Cir.), cert. denied, 109 S. Ct. 377 (1988); *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986); *Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443 (9th Cir. 1986); *CBS Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975); *Connecticut Magazine v. Moraghan*, 676 F. Supp. 38 (D. Conn. 1987); *Central S.C. Chapter, Soc'y of Professional Journalists, Sigma Delta Chi v. Martin*, 431 F. Supp. 1182 (D.S.C.), aff'd, 556 F.2d 706 (4th Cir. 1977), cert. denied, 434 U.S. 1022 (1978); *KPNX Broadcasting Co. v.*

persons connected with the trial from speaking with the media about the case during a specified time period.<sup>9</sup>

Gag orders serve primarily to protect the integrity of both the jury selection and deliberation processes. With respect to jury selection, gag orders theoretically prevent the general public from hearing potentially prejudicial comments prior to trial, and the orders thereby substantially increase the pool of prospective impartial jurors.<sup>10</sup> Once a jury has been selected, gag orders further prevent irrelevant or prejudicial information, which may taint the deliberation process, from reaching the jurors. In other words, journalists frequently pursue information "that satisfies reader curiosity, that is sensational and . . . that sells newspapers or boosts ratings."<sup>11</sup> But much of the information that is "sensational," however, is also inadmissible in a court of law.<sup>12</sup> Given the general mistrust of a juror's ability to separate admissible from inadmissible evidence, gag orders arguably preserve "the protective effect of the . . . exclusionary rules of evidence" by precluding extrajudicial publication of inadmissible evidence.<sup>13</sup>

Despite the popularity of gag orders in the ranks of the judiciary, the orders have not gone unchallenged by persons who believe that such orders infringe upon their first amendment rights. Attorneys,<sup>14</sup> parties,<sup>15</sup> and witnesses<sup>16</sup> directly restrained from speaking with the media have attacked the constitutionality of gag orders as prior restraints on free speech. This Comment does not, however, focus on the concerns of persons directly restrained by injunctions. Rather, this Comment addresses the predicament that arises when news agencies challenge the validity of gag orders that do not directly restrain

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Superior Court, 139 Ariz. 246, 678 P.2d 431 (1984); *Florida Freedom Newspapers v. McCrary*, 520 So. 2d 32 (Fla. 1988).

9. See, e.g., *Young*, 522 F.2d at 236 (ordering "all counsel and Court personnel, all parties concerned with this litigation, whether plaintiffs or defendants, their relatives, close friends, and associates . . . to refrain from discussing in any manner whatsoever these cases with members of the news media or the public").

10. See *Sigma Delta Chi*, 431 F. Supp. at 1189 (Prejudicial information disseminated prior to trial "has the effect of making more difficult the selection of an impartial jury.").

11. *Free Press-Fair Trial: An Introduction*, 20 ST. LOUIS U.L.J. 640, 641 (1976).

12. *Id.* at 640-41 ("Editorial policy regarding the selection and reporting of news differs dramatically from rules governing the admission of evidence in criminal trials.").

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 comment (1983); see also *Sheppard v. Maxwell*, 384 U.S. 333, 360 (1966) (exclusionary rules "rendered meaningless when news media make [inadmissible evidence] available to the public").

14. See, e.g., *Levine v. United States Dist. Court*, 764 F.2d 590 (9th Cir. 1985), cert. denied, 476 U.S. 1158 (1986); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

15. See, e.g., *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969) (defendants challenged order prohibiting public discussion of their case).

16. See, e.g., *In re Russell*, 726 F.2d 1007 (4th Cir.), cert. denied, 469 U.S. 837 (1984).

the media's right to publish, but that do restrain the extrajudicial speech of trial participants and thereby frustrate the media's attempts to gather information.

Specifically, this Comment attempts to unravel the doctrine of prior restraint in terms of indirect restraining orders.<sup>17</sup> Section II of this Comment explores the historical origins and judicial interpretations of prior restraint, addresses the conflict in the appellate court decisions that have discussed the indirect gag order issue, and analyzes the definitional dispute at the crux of the issue. Section III discusses the rights to gather news and to receive communications in terms of their relationship with the prior restraint doctrine.<sup>18</sup> Finally, in Section IV, this Comment concludes that the United States Supreme Court should take up the indirect gag order issue to determine the contours of the constitutional doctrine of prior restraint.

## II. THE DOCTRINE OF PRIOR RESTRAINT

### A. *The Origins of the Concept*

Like many constitutional theories, the doctrine of prior restraint, although centuries old, has not yet crystallized into a hard and fast principle.<sup>19</sup> Nonetheless, the words of Professor Emerson constitute a helpful, albeit elastic, definition of prior restraint: Prior restraint is an "official restriction[ ] imposed upon speech or other forms of expression *in advance* of actual publication," as opposed to subsequent punishment which penalizes the disseminator "*after* the communication has been made as a punishment for having made it."<sup>20</sup>

Analysis of the prior restraint doctrine necessarily begins with its English origins.<sup>21</sup> The prior restraint doctrine gradually emerged in

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17. This Comment refers to restraining orders that specifically prohibit the media from disseminating certain information as "direct" gag orders. In contrast, this Comment identifies restraining orders that prohibit trial participants from speaking to the press, but that do not specifically restrain the press from publication, as "indirect" gag orders. The latter term accurately conveys that gag orders against trial participants indisputably target news agencies even though the orders do not literally restrain the media.

18. The right to gather news, the right to receive communications, and prior restraint are so interrelated in this context that any attempt to separate them is concededly artificial. See Schmidt & Volner, *Nebraska Press Association: An Open or Shut Decision?*, 29 STAN. L. REV. 529, 535 (1977) (commenting that first amendment analysis "give[s] credence to those theorists who hold that the law is a seamless web"). Nonetheless, by treating these concepts as separate, yet dependent, strands of the same issue, this Comment seeks to avoid the trap of loose terminology and muddy analysis.

19. See Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 419 (1983).

20. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 648 (1955) (emphasis added).

21. For a more comprehensive look at the English history of prior restraint, see J. LOFTON, *supra* note 2, at 6-10.

England in the fifteenth century with the advent of the printing press.<sup>22</sup> By the seventeenth century, all printing affairs were under the Crown's monopolistic control.<sup>23</sup> Of particular importance, the Licensing Act of 1662 prohibited publication of seditious and heretical material and further required a license before disseminating any printed matter.<sup>24</sup> In 1695, the Licensing Act expired and was never reinstituted.<sup>25</sup> Ironically, the House of Commons did not condemn the licensing system as inherently evil, but it instead cited numerous administrative burdens as justification for the termination.<sup>26</sup>

Eventually, however, freedom from licensing systems "came to assume the status of a common law or natural right."<sup>27</sup> This common sentiment ultimately found its way into the first amendment,<sup>28</sup> elevating the concept "to the status of constitutional principle."<sup>29</sup> As a constitutional principle, the doctrine "forbids the Federal Government [and the states through incorporation of the first amendment into the fourteenth amendment] to impose any system of prior restraint, with certain limited exceptions, in any area of expression that is within the boundaries of [the First] Amendment."<sup>30</sup> Notwithstanding the doctrine's constitutional gloss, more than a century passed before the United States Supreme Court recognized the prohibition of prior restraint as a vital constitutional concept in *Near v. Minnesota ex rel. Olson*.<sup>31</sup>

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22. *Id.* at 6.

23. Emerson, *supra* note 20, at 650.

24. *Id.*

25. *Id.* at 651.

26. *Id.*

27. *Id.*; see also 4 W. BLACKSTONE, COMMENTARIES \*151-52 ("[L]iberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.").

28. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

29. Emerson, *supra* note 20, at 652.

30. *Id.* at 648; see also *Near*, 283 U.S. at 716 ("[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."); A. BICKEL, THE MORALITY OF CONSENT 61 (1975) ("[I]t is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.").

31. 283 U.S. 697 (1931). Although the doctrine prohibiting prior restraint has emerged as a concept of constitutional proportions, some critics doubt its utility as a first amendment doctrine. See, e.g., Jeffries, *supra* note 19, at 437 (noting that current use of prior restraint doctrine "is so far removed from its historic function, so variously invoked and discrepantly applied . . . that it no longer warrants use as an independent category of First Amendment analysis"). Critics also question the validity of the traditional view that prior restraint restricts first amendment freedoms more than subsequent punishment. See M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 4.04, at 4-25 (1984) ("[T]he reasons for the distinction are questionable, and, at the very least, confused and distorted."); Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 551 (1977)

## B. Judicial Interpretation of the Doctrine

### 1. THE SOURCE OF MODERN PRIOR RESTRAINT DOCTRINE: *Near v. Minnesota ex rel. Olson*

*Near v. Minnesota ex rel. Olson*<sup>32</sup> is the watershed case addressing the issue of prior restraint.<sup>33</sup> In *Near*, the Supreme Court reviewed the "Minnesota Gag Law,"<sup>34</sup> which provided that any person "engaged in the business" of publishing "malicious, scandalous and defamatory" material could be enjoined from further publication.<sup>35</sup> The case commenced when a county attorney brought an action against the publisher of *The Saturday Press*, alleging a violation of the statute through the periodical's "malicious, scandalous and defamatory" attacks against law enforcement officials.<sup>36</sup> The trial court's ruling, which was affirmed by the Minnesota Supreme Court,<sup>37</sup> "perpetually enjoined" the defendants from further publication of such matter.<sup>38</sup>

Although the Supreme Court was not confronted with a licensing scheme per se, the majority found that the statute in dispute operated much like the English censoring system.<sup>39</sup> Consequently, the Court struck down the statute because it "provide[d] . . . for suppression and injunction, that is, for restraint upon publication."<sup>40</sup> The *Near* Court thus expanded the prior restraint doctrine, which traditionally applied only to licensing schemes, to encompass injunctions on speech and

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("[T]he pinpointed freeze of a narrowly drawn gag order might produce less refrigeration overall than the broader chill of threatened subsequent punishment."); Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951) ("The generalization that prior restraint is particularly obnoxious . . . must yield to more particularistic analysis."); Jeffries, *supra* note 19, at 419 (arguing that the judiciary has offered "no coherent basis" for making distinction between prior restraint and subsequent punishment); Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 281 (1982) (injunctions carry "a significantly lesser cost to speech" than subsequent punishment). *But see* Emerson, *supra* note 20, at 656-60 (listing characteristics of prior restraint that justify treating it separately from subsequent punishment); Goodale, *Legal Pitfalls in the Right to Know*, 1976 WASH. U.L.Q. 29, 29 ("[P]rior restraint, even if lifted on appeal, rob[s] a story of its timeliness . . . while a story later found libelous or in contempt of court ma[kes] its way into print.").

32. 283 U.S. 697 (1931).

33. For a comprehensive review of *Near*, see F. FRIENDLY, MINNESOTA RAG (1981).

34. *Near*, 283 U.S. at 702.

35. *Id.*

36. *Id.* at 703-04. Specifically, the articles in dispute denounced public officers for failing to take action against a gangster. *Id.* at 704.

37. *State ex rel. Olson v. Guilford*, 179 Minn. 40, 228 N.W. 326 (1929).

38. *Near*, 283 U.S. at 706.

39. *See id.* at 713 (stating that the statute "put[s] the publisher under an effective censorship," much like the licensing system which was rejected in England).

40. *Id.* at 715.

publication. Chief Justice Hughes, writing for the majority, validated the leap by concluding that the statute was inconsistent "with the conception of the liberty of the press as historically conceived and guaranteed."<sup>41</sup>

The *Near* dissent objected to the majority's historical conception. Justice Butler argued that the statute in question did not operate as a previous restraint as that doctrine was originally contemplated.<sup>42</sup> According to Justice Butler, the majority's finding of a "similarity between the . . . statute [preventing] *further* publication . . . and the *previous restraint* upon the press by licensors" bordered on the absurd.<sup>43</sup>

Justice Butler correctly observed that the Minnesota statute only authorized the use of an injunction *subsequent* to the offense, and therefore did not by its terms restrain publishers prior to publication.<sup>44</sup> Nonetheless, by subjecting publishers to the discretion of a single judge without a jury, the statute effectively placed judges in the position of censors; "any publisher seeking to avoid prison would, in sheer self-protection, have to clear in advance any doubtful matter with the official wielding such direct, immediate, and unimpeded power to sentence."<sup>45</sup> Thus, the statute by its "operation and effect" acted as an unconstitutional prior restraint.<sup>46</sup> This broad interpretation by a slim majority<sup>47</sup> has since served as the cornerstone for prior restraint analysis.<sup>48</sup>

## 2. THE DEMISE OF DIRECT GAG ORDERS AGAINST THE PRESS:

### *Nebraska Press Association v. Stuart*

The Supreme Court addressed the dual considerations of prior restraint on publication and the right to an impartial jury in *Nebraska Press Association v. Stuart*.<sup>49</sup> The dispute in *Nebraska Press* arose out of a murder trial in which the defendant was accused of murdering six

41. *Id.* at 713.

42. *Id.* at 735 (Butler, J., dissenting).

43. *Id.* at 736.

44. *Id.* at 735.

45. Emerson, *supra* note 20, at 654.

46. *Near*, 283 U.S. at 709.

47. A five-to-four majority decided the case. *See id.* at 697.

48. The pronouncement in *Near* accounts for the popular opinion that injunctions prohibiting future publication utterly fail under the prior restraint doctrine. *See* Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 15 (1981) (Injunctions are at "the core of the prior restraint doctrine."); Jeffries, *supra* note 19, at 426 (modern prior restraint doctrine understood as "rule of special hostility to injunctions"). *But see* Mayton, *supra* note 31, at 249 ("Injunctions against speech . . . are not the kind of restraint that the 'English experience' teaches us to abhor.").

49. 427 U.S. 539 (1976). Although *Nebraska Press* represents a milestone in and of itself,



family members in a rural Nebraska community.<sup>50</sup> Due to the highly sensational nature of the case, the trial court issued a gag order to prevent prejudicial information from reaching potential jurors.<sup>51</sup> The order, in the form presented to the Supreme Court, prohibited the publication of "the existence and nature of any confessions," except those made to the press, and "other facts 'strongly implicative' of the accused."<sup>52</sup>

The Court unanimously ruled in favor of the news media, holding that the gag order constituted an unconstitutional prior restraint on publication.<sup>53</sup> A single statement captured the constitutional underpinnings of the Court's decision: "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."<sup>54</sup> The Court specifically referred to the dichotomy between prior restraint and subsequent punishment, stating that while "a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."<sup>55</sup>

Although the majority opinion refused to accord the first amendment absolute priority over the sixth amendment,<sup>56</sup> the test that emerged from *Nebraska Press* assured the "'heavy presumption' against [the] constitutional validity" of prior restraints.<sup>57</sup> Writing for the Court, Chief Justice Burger erected a tripartite test to determine whether "the gravity of the 'evil,' discounted by its improbability, jus-

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the opinion also provides a helpful survey of some of the major decisions relating to the tension between free press and fair trial considerations up to that point. *Id.* at 548-59.

50. *Id.* at 542.

51. *Id.*

52. *Id.* at 545.

53. *Id.* at 570. For diverse viewpoints on the validity and impact of this holding, see *Symposium: Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 383 (1976-1977).

54. *Nebraska Press*, 427 U.S. at 559.

55. *Id.* (borrowing the famous metaphor from A. BICKEL, *supra* note 30, at 61).

56. *Id.* at 561. The concurring opinions, however, hedged toward an absolutist stance. Justice Brennan, along with Justices Stewart and Marshall, would have adopted an unconditional ban on gagging the press, arguing that prior restraint "on the freedom of the press is a constitutionally impermissible method for enforcing" fair trial concerns. *Id.* at 572 (Brennan, J., concurring). Justice Stevens suggested that he might accept Justice Brennan's conclusion if faced squarely with the issue. *Id.* at 617 (Stevens, J., concurring). Justice White expressed "grave doubt" as to whether gag orders against the press "would ever be justifiable," but declined to join Justice Brennan on this case of first impression. *Id.* at 570-71 (White, J., concurring).

57. *Id.* at 558 (quoting *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968)). *But see* STANDARDS FOR CRIMINAL JUSTICE, Fair Trial and Free Press, Standard 8-3.1 commentary at 8-29 (1978) ("Rather than invite courts to probe the limits of the first amendment in this area . . . it is preferable to close the door entirely to the alternative of [direct] prior restraints."); Sack, *Principle and Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 411, 414 (1977) (arguing that the majority's position would not, in the short term, sufficiently deter trial courts from imposing gag orders against the press).

tifies such invasion of free speech as is necessary to avoid the danger."<sup>58</sup> This test consists of a close examination of: (1) "the nature and extent of pretrial news coverage";<sup>59</sup> (2) the availability of less restrictive alternatives;<sup>60</sup> and (3) the effectiveness of the disputed restraining order.<sup>61</sup>

In applying the test to the facts in *Nebraska Press*, the Supreme Court analyzed the three factors individually. First, the Court found that the trial judge could have reasonably determined that the probable nature and extent of pretrial publicity might interfere with the defendant's constitutional rights.<sup>62</sup> Despite this justifiable concern, the Court concluded that the trial court failed to adequately investigate less restrictive alternatives.<sup>63</sup> To overcome the second hurdle of the test, the court issuing the order must make "express findings" of the insufficiency of those less restrictive alternatives.<sup>64</sup> Finally, the Court listed several setbacks that marred the effectiveness of the *Nebraska Press* gag order, setbacks which included jurisdictional limitations, the difficulty in drafting a properly tailored order, and the impossibility of containing the community rumor mill.<sup>65</sup> In sum, the Court concluded that the record did not overcome "the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial [would] be denied."<sup>66</sup>

Although *Nebraska Press* was generally considered a coup for the media, issues left undecided dampened the victory.<sup>67</sup> Specifically, the Court did not resolve the issue of whether the press could successfully challenge an *indirect* gag order, as opposed to an order directed specifically at the press, as an unconstitutional prior restraint.<sup>68</sup> To date,

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58. *Nebraska Press*, 427 U.S. at 562 (quoting Learned Hand's test in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

59. *Id.*

60. *Id.* The Court listed the following as less restrictive alternatives: (1) change of venue for trial; (2) continuance of trial until publicity abates; (3) in-depth voir dire; (4) forceful jury instructions to decide the issues only on the presented evidence; and (5) jury sequestration. *Id.* at 563-64 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 357-62 (1966)). The Court also noted that *Sheppard* suggested the use of gag orders against trial participants to control publicity. *Id.* at 564 (citing *Sheppard*, 384 U.S. at 361-62 (dictum)).

61. *Id.* at 562.

62. *Id.* at 562-63.

63. *Id.* at 565.

64. *Id.* at 563.

65. *Id.* at 565-67.

66. *Id.* at 569.

67. See Sack, *supra* note 57, at 412 (The *Nebraska Press* decision leaves "a residue of apprehension, a sense that, although the guarantees of a free press may have been vindicated in this case, they might not be next time.").

68. *Nebraska Press*, 427 U.S. at 564 n.8.

the Supreme Court has declined the opportunity to decide this issue,<sup>69</sup> leaving perhaps too much discretion and lack of direction to the lower courts dealing with this problem.<sup>70</sup>

### 3. THE *Nebraska Press* END RUN: "GAGGING" TRIAL PARTICIPANTS

Soon after the Supreme Court handed down its decision, it was evident that *Nebraska Press* represented merely a hollow threat.<sup>71</sup> As predicted by the Senate Subcommittee on Constitutional Rights, the future issuance of orders restraining trial participants would "constitute a serious backdoor threat to First Amendment interests [and would] . . . presage the next wave of free press-fair trial litigation."<sup>72</sup> Thus, as sure as *Nebraska Press* guaranteed the demise of unjustifiable orders that *directly* restrain the press, it provoked the unprincipled use of gag orders that, instead, *indirectly* restrain the press by restraining trial participants.<sup>73</sup>

#### a. The Birth of the Indirect Gag Order: *Sheppard v. Maxwell*

Courts have justified the widespread use of indirect gag orders by relying on *Sheppard v. Maxwell*,<sup>74</sup> a pre-*Nebraska Press* Supreme Court decision that is sometimes attributed with giving "birth" to the gag order.<sup>75</sup> The facts in *Sheppard* indicate that the trial court may

69. See, e.g., *In re Dow Jones & Co.*, 109 S. Ct. 377 (1988). Justice White, joined by Justices Brennan and Marshall, would have granted the petition for certiorari because of the importance of the issue and the conflict in the appellate courts. *Id.* at 378 (White, J., dissenting). Justice Stevens did not take part in the decision. *Id.*

70. Professor Benno Schmidt noted the irony that, despite the serious constitutional implications of *Nebraska Press*, the decision "was handed down in a frantic final week of the most crowded term in the Court's history." Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 475 (1977). He suggested that the Court's opinion may have met "time pressures" at the expense of clarity, which may account for the continued speculation on the true significance of the case. *Id.*

71. See Prettyman, *Nebraska Press Association v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?*, 20 ST. LOUIS U.L.J. 654, 661-62 (1976) (noting that one future problem will be determining "the extent to which courts can, or should, impose restraints on persons who might normally be expected to speak with members of the press"); Sack, *supra* note 57, at 427 (As direct restraining orders against the press become obsolete, "orders silencing [trial participants] are likely to become widespread."); Schmidt & Volner, *supra* note 18, at 530 ("[T]he silencing of trial participants will become [one of the] alternative methods used by courts" to block trial publicity.).

72. STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., FREE PRESS-FAIR TRIAL iii (Comm. Print 1976) [hereinafter SENATE REPORT].

73. For several representative examples, see *infra* notes 91-118 and accompanying text.

74. 384 U.S. 333 (1966).

75. See Younger, *The Sheppard Mandate Today: A Trial Judge's Perspective*, 56 NEB. L. REV. 1, 8 (1977).

have had reason for concern. The defendant in the *Sheppard* case was charged with second-degree murder for the bludgeoning of his pregnant wife.<sup>76</sup> Allegations of sex and scandal aroused the media's curiosity at the outset.<sup>77</sup> Indeed, the trial took place in the "atmosphere of a 'Roman holiday' for the news media," completely unrestricted by the trial court.<sup>78</sup>

Upon conviction, the defendant sought a writ of habeas corpus on the grounds that the state failed to give him a fair trial.<sup>79</sup> The United States District Court for the Southern District of Ohio found in the defendant's favor and granted the writ.<sup>80</sup> The United States Court of Appeals for the Sixth Circuit reversed.<sup>81</sup> The Supreme Court granted certiorari and held that the defendant had been denied a fair trial in contravention of the due process clause of the fourteenth amendment.<sup>82</sup>

Writing for the majority, Justice Clark admonished the trial judge for failing to take measures to insure that the defendant would receive his constitutional right to a fair trial.<sup>83</sup> According to the Court, the trial judge "might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters."<sup>84</sup> Although this language serves merely as dictum,<sup>85</sup> it has assumed dogmatic significance as authorization for indirect gag orders that suppress trial publicity.<sup>86</sup>

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76. *Sheppard*, 384 U.S. at 335.

77. Some of the headlines that appeared during that period included: "Kerr [Captain of the Cleveland Police] Urges Sheppard's Arrest"; "Why Isn't Sam Sheppard in Jail?"; "Quit Stalling—Bring Him In"; and "Blood Is Found In Garage." *Id.* at 340-42.

78. *Id.* at 356 (quoting *State v. Sheppard*, 165 Ohio St. 293, 294, 135 N.E.2d 340, 342 (1956)).

79. *Id.* at 335.

80. *Sheppard v. Maxwell*, 231 F. Supp. 37 (S.D. Ohio 1964).

81. *Sheppard v. Maxwell*, 346 F.2d 707 (6th Cir. 1965).

82. *Sheppard*, 384 U.S. at 335.

83. *Id.* at 363.

84. *Id.* at 361.

85. Because the trial judge had not issued a restraining order against the trial participants, the precise issue of the constitutionality of such an order was not before the Supreme Court at that time. Nonetheless, some commentators believe that Justice Clark asserted more than mere dictum. According to Judge Younger, the Court's statement that the judiciary "must take such steps . . . that will protect their processes from prejudicial outside interferences" is not just a strong suggestion, but rather, the "*Sheppard* Mandate." Younger, *supra* note 75, at 6 (quoting *Sheppard*, 384 U.S. at 363); see also Brief for Respondents at 12, *Dow Jones & Co. v. Simon*, 109 S. Ct. 377 (1988) (No. 88-229) [hereinafter Respondents' Brief in *Dow Jones*] (arguing that *Sheppard* "required" trial judges to avert prejudicial publicity by measures such as silencing trial participants).

86. Although courts have adopted the Supreme Court's language to justify increased use of indirect gag orders, the Court's express limitation—a judge may proscribe statements divulging "prejudicial matters"—arguably undercuts the justification for expansive use of

The *Sheppard* dictum has been widely construed as "more nearly directive than suggestive."<sup>87</sup> Following the decision, several organizations implemented guidelines or standards in response to the Supreme Court's pronouncement. Their interpretations of *Sheppard* presumed that a trial judge's order restraining trial participants from speaking with the media would invariably pass constitutional muster.<sup>88</sup> Given this formidable reaction to *Sheppard* from both the judiciary and the bar, it is not surprising that the past two decades have seen a proliferation of orders restraining trial participants as a means to indirectly restrain the press. Courts have employed this safety valve with vigor despite the availability of other options suggested by both *Sheppard* and *Nebraska Press*.<sup>89</sup> Indeed, the "gag" on trial participants has become one of "the most commonly reported devices" used to effectively muzzle the media.<sup>90</sup>

b. The Paradigm Case: *In re Dow Jones & Co.*

*In re Dow Jones & Co.*<sup>91</sup> provides a typical example of the operation of an indirect gag order. The controversy in *Dow Jones* stemmed from the highly publicized investigation of the Wedtech Corpora-

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indirect gag orders. See *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 259, 678 P.2d 431, 444 (1984) (Feldman, J., dissenting). In light of this restriction, one may persuasively argue that the strong presumption against the constitutional validity of direct gag orders, as demonstrated by the rigorous tripartite test of *Nebraska Press*, applies with equal muscle to indirect gag orders. The first part of the *Nebraska Press* test requires a close examination of "the nature and extent of pretrial news coverage." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976); see also *supra* notes 58-59 and accompanying text. Thus, if a court determines that the "nature" of pretrial publicity would not involve "prejudicial matters," then presumably the imposition of a restraining order, direct or indirect, would violate the first amendment.

87. *Hirschkop v. Snead*, 594 F.2d 356, 366 n.8 (4th Cir. 1979).

88. An advisory committee to the American Bar Association initially developed the Reardon Report, which the ABA approved in 1968 and updated with the Goodwin Report in 1978. STANDARDS FOR CRIMINAL JUSTICE, Fair Trial and Free Press (1978). These guidelines contain a charge that a court, in its discretion, "shall instruct jurors and court personnel and shall caution parties and witnesses not to make extrajudicial statements relating to the case or the issues in the case for dissemination by any means of public communication during the course of the trial." *Id.* at Standard 8-3.6(c). The Judicial Conference of the United States issued similar recommendations. See Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1969), *supplemented*, 51 F.R.D. 135 (1971), *revised*, 87 F.R.D. 519 (1981). In addition, the Model Code of Professional Responsibility and the Model Rules of Professional Conduct contain rules emanating from *Sheppard* that forbid attorneys from making certain extrajudicial statements. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).

89. See *supra* note 60 and accompanying text.

90. D. GILLMOR & J. BARRON, MASS COMMUNICATION LAW, CASES AND COMMENT 521 (3d ed. 1979).

91. 842 F.2d 603 (2d Cir.), *cert. denied*, 109 S. Ct. 377 (1988).

tion,<sup>92</sup> which implicated several public officials, attorneys, and Wedtech insiders.<sup>93</sup> The investigation prompted an indictment charging these parties with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), misusing their public offices, and financially benefitting from the illegal activities of Wedtech.<sup>94</sup> High public interest in the case triggered "escalating publicity duels" between the prosecution and the defense, the results of which appeared in major newspapers.<sup>95</sup> Upon the motion of one of the defendants, the district court issued a broad gag order, which was later modified to restrain prosecutors, defendants, and defense counsel from making extrajudicial statements concerning the case to the media.<sup>96</sup> Various news agencies appealed from this order.<sup>97</sup>

The United States Court of Appeals for the Second Circuit held that the order did not constitute a prior restraint.<sup>98</sup> This quick conclusion, however, lacked convincing support. First, the court's dispositive distinction reflects only superficial analysis. Specifically, the court stressed the "fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party,"<sup>99</sup> relying on the "fact" that the media "cannot be haled into court for violating [the] terms"<sup>100</sup> of the order. The court failed to consider, however, that although members of the press cannot be haled into court in such a situation, they surely can be sent to jail. Courts have been quite willing to hold reporters in contempt for refusing to disclose sources who leaked information in contravention of restraining orders.<sup>101</sup> Second, the court's actual methodology dif-

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92. The Wedtech investigation examined allegations of fraud, extortion, and bribery in obtaining federal military defense contracts. *Id.* at 604.

93. *Id.* at 605.

94. *Id.*

95. *Id.*

96. *Id.* at 605-06. Although the order did not preclude the reporting of courtroom activities, it prohibited "virtually all other extrajudicial speech relating to the pending Wedtech case." *Id.* at 606.

97. Petitioners included Dow Jones & Co., The New York Times Co., CBS Inc., National Broadcasting Co., The Associated Press, and Newsday. *Id.* at 604.

98. *Id.* at 609.

99. *Id.* Curiously, petitioners' lead counsel acknowledged this identical point eleven years earlier in his commentary on *Nebraska Press*. Respondents' Brief in *Dow Jones*, *supra* note 85, at 7 (citing Sack, *supra* note 57, at 427-28); see also *Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1446 (9th Cir. 1986) (same).

100. *Dow Jones*, 842 F.2d at 608.

101. SENATE REPORT, *supra* note 72, at 12 (Courts "have not been reluctant to hold the press responsible when [gag orders against trial participants] are violated."); see, e.g., *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (Dist. Ct. App. 1971) (sustaining contempt order against reporter who refused to reveal the source who had given him prohibited information in the Manson case).

ferred considerably from its stated methodology. The court initially stated that it would analyze the "operation and effect [of the order] in the particular circumstances of this case."<sup>102</sup> In the very next paragraph, however, the court conceded that although the order "might have [had] an effect similar to that of a prior restraint," its indirect nature "deflate[d] what would otherwise be a serious concern regarding judicial censorship of the press."<sup>103</sup> Thus, any sensitivity to the "operation and effect" of the order was conspicuously absent despite the court's claim to the contrary.

### c. Conflict in the Appellate Courts

The Court in *Dow Jones* derived support from an earlier decision of the United States Court of Appeals for the Ninth Circuit,<sup>104</sup> *Radio & Television News Association v. United States District Court*.<sup>105</sup> The controversy in *Radio & Television News* arose out of the trial of a former FBI agent charged with espionage.<sup>106</sup> As a precaution, the trial judge ordered trial counsel to refrain from speaking to the news media about the case.<sup>107</sup> On appeal by representatives of the press, the Ninth Circuit held that the press had no first amendment right to interview trial participants.<sup>108</sup> Without the collateral right to obtain information from trial participants, there was no information to disseminate and, hence, no prior restraint issue.<sup>109</sup>

*Radio & Television News* relied on two related propositions in determining that the gag order did not violate the first amendment. First, the court regarded the indirect effect on the media in that case as "significantly different" than the effect of an order directly restraining publication.<sup>110</sup> The order did not prohibit the press from questioning trial counsel; "[t]rial counsel simply [would] not be free to answer."<sup>111</sup> Second, according to the court, the media enjoys a narrow right to attend criminal trials which does not encompass unbridled access to trial participants.<sup>112</sup> Specifically, members of the press

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102. *Dow Jones*, 842 F.2d at 608 (emphasis added) (citing *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-42 (1957)).

103. *Id.* (emphasis added).

104. *Id.* ("The Ninth Circuit has drawn the distinction between restraining orders directed at trial participants challenged by the press and those challenged by trial participants.").

105. 781 F.2d 1443 (9th Cir. 1986).

106. *Id.* at 1444.

107. *Id.*

108. *Id.* at 1447.

109. *Id.*

110. *Id.* at 1446.

111. *Id.*

112. *Id.* (The right of access to a trial is no more than the "right to sit, listen, watch, and report.") (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980)).

hold no more "than a right to attend the trial and report on their observations."<sup>113</sup>

The court analogized restraint on trial participants to prohibitions against "leaking" by government officials.<sup>114</sup> Presumably, an order restraining the press from publishing "leaked" information would violate the first amendment.<sup>115</sup> On the other hand, the press would have no grounds to challenge the per se prohibition against leaking.<sup>116</sup> Thus, the court reasoned that the media's news-gathering right is derived entirely from a speaker's willingness to speak.<sup>117</sup>

Although *Radio & Television News* and *Dow Jones* appear to represent the majority opinion on the issue of indirect gag orders,<sup>118</sup> some courts adhere to the view that an indirect gag order represents an unconstitutional prior restraint. In *CBS Inc. v. Young*,<sup>119</sup> the United States Court of Appeals for the Sixth Circuit reviewed a restraining order that had been issued in a consolidated civil action<sup>120</sup> arising out

113. *Id.* at 1447.

114. *Id.*

115. *Id.* ("When 'Deep Throat' has spoken and is believed, Woodward, Bernstein and Bradlee are free to publish.") (quoting Sack, *supra* note 57, at 420). This statement implicitly suggests that if trial participants divulge information in contravention of the gag order, then the media may freely publish that information. Notwithstanding the court's insinuation, history proves that when journalists publish information gained from "leakers," they run the risk of a contempt order if they do not expose their sources on demand. See *supra* note 101 and accompanying text; cf. *Branzburg v. Hayes*, 408 U.S. 665, 708-09 (1972) (Journalists have no first amendment right to refuse to answer questions during grand jury investigations, even though confidential sources may be revealed.).

116. *Radio & Television News*, 781 F.2d at 1447.

117. See *id.*

118. Other decisions have reached similar conclusions. See, e.g., *Central S.C. Chapter, Soc'y of Professional Journalists, Sigma Delta Chi v. Martin*, 431 F. Supp. 1182, 1186 (D.S.C.), *aff'd*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 678 P.2d 431 (1984); *Florida Freedom Newspapers v. McCrary*, 520 So. 2d 32 (Fla. 1988).

119. 522 F.2d 234 (6th Cir. 1975) (per curiam).

120. *Id.* at 236. Because criminal trials are arguably more sensational than civil trials, it is not surprising that gag orders represent, for the most part, a criminal justice phenomenon. Nonetheless, *Young* demonstrates that gag orders may be issued in civil litigation. Consequently, the tension between a free press and fair trials also arises in the civil context.

The arguments for a free press are particularly amplified in the civil arena. First, although the American system of government places a premium on "impartial justice to settle civil disputes," one can infer from the sixth amendment that criminal trials require an even "greater insularity against the possibility of [unfairness]." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 257-58 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). A comparison of the sixth amendment's "impartial jury" clause to the seventh amendment's "right of trial by jury" clause quickly demonstrates the constitutional paternalism granted to criminal defendants. See U.S. CONST. amends. VI, VII. Accordingly, fair trial arguments in the context of civil trials do not rise to the same constitutional height as in criminal trials. *Bauer*, 522 F.2d at 258. Second, because civil litigation is ordinarily more protracted than a criminal trial, "there might be a restriction on speech for many years before a complaint is even filed."



of the 1970 riots at Kent State University.<sup>121</sup> This broad order, which was challenged only by the news media,<sup>122</sup> directed the parties and their relatives, friends, and associates to refrain from speaking with the media regarding the case.<sup>123</sup>

The *Young* court noted that the challenged order critically impinged upon the media's ability to gather information.<sup>124</sup> Based on this observation, the court reached the "inevitable" conclusion that the order "constitute[d] a prior direct restraint upon freedom of expression."<sup>125</sup> Unfortunately, the court offered virtually no reasoning to support its conclusion that a restraint on news-gathering constitutes a prior restraint on expression. Without more, this conclusion may be attacked as unprincipled and vague.<sup>126</sup>

Nonetheless, the *Young* opinion persuaded the United States Court of Appeals for the Tenth Circuit in *Journal Publishing Co. v. Mechem*.<sup>127</sup> The issue on appeal was whether the trial judge erred in ordering the jurors of a controversial civil rights trial to refrain from discussing the verdict with anyone.<sup>128</sup> The court determined that "any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint," including restraints on the gathering of news.<sup>129</sup> Applying this strict test to the order in dispute, the court held that the order was "impermissibly overbroad" and, therefore, an unconstitutional infringement upon first amend-

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*Id.* Thus, a gag order in the civil litigation setting would cause significantly more damage to free speech principles than the relatively short-term criminal gag order. *Id.* Finally, civil actions are frequently brought to educate the public on issues of societal importance. *Id.* For example, actions have been filed on behalf of the poor to expose "the need for governmental action or correction." *Id.* In these cases, it is difficult to conceive of a situation in which silencing trial participants would outweigh the importance of communicating the information to the public. *See id.*

121. *Young*, 522 F.2d at 236.

122. *Id.* at 240 n.1.

123. *Id.* at 236; *see also supra* note 9.

124. *Young*, 522 F.2d at 239.

125. *Id.*

126. Some courts have commented on *Young's* dubious legal significance. *See* Central S.C. Chapter, Soc'y of Professional Journalists, Sigma Delta Chi v. Martin, 431 F. Supp. 1182, 1186 (D.S.C.), *aff'd*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (finding *Young* of "questionable authority"); KPNX Broadcasting Co. v. Superior Court, 139 Ariz. 246, 255, 678 P.2d 431, 440 (1984) (noting that "*Young* was decided without the guidance of the recent right of access cases"); Florida Freedom Newspapers v. McCrary, 520 So. 2d 32, 36 (Fla. 1988) (rejecting *Young's* "naked assumption that prohibition on comment is a prior restraint"). *But see* Connecticut Magazine v. Moraghan, 676 F. Supp. 38, 42 (D. Conn. 1987) (citing *Young* as persuasive authority).

127. 801 F.2d 1233, 1236 (10th Cir. 1986) (citing *Young* as persuasive authority).

128. *Id.* at 1235.

129. *Id.* at 1236 (emphasis added) (citing United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978)).

ment principles.<sup>130</sup>

Despite its emphatic conclusions, the *Mechem* opinion exemplifies the widespread confusion concerning the doctrine of prior restraint. In particular, the *Mechem* court referred to the order in dispute as a "prior restraint on the gathering of news."<sup>131</sup> Such a statement imprecisely merges the concepts of restraint on *news-gathering* and prior restraint on *dissemination*.<sup>132</sup> The prior restraint doctrine has traditionally functioned as a term of art for the restraint "of *expression* in advance of actual publication."<sup>133</sup> Prior restraint terminology has not been used to refer to restraints on the gathering process in advance of expression. Although it might be argued that the distinction is purely semantic, this Comment will demonstrate that a determination of the issue in question may be resolved only with precision.<sup>134</sup>

### C. *A Closer Look at the Prior Restraint Conundrum: A Definitional Dispute*

Resolution of the issue of whether an indirect gag order constitutes a first amendment infringement of the media's rights turns on one's perspective of the underlying purpose of the prior restraint doctrine. That is, does this constitutional principle protect freedom of expression as a general tenet, or is it more concerned with protecting the speech of persons who actually possess information that they wish to communicate? Additionally, if a court determines that the doctrine focuses on the latter, one must question the validity of the distinction between persons who actually have information and those who would have it but for the restraining order. Answers to these questions depend on whether courts choose to view the issue from a formalistic perspective or a realistic perspective.

#### 1. THE FORMALISTIC PERSPECTIVE: PROTECTING THE SPEECH OF "GAGGED" INDIVIDUALS

Appellate courts that have upheld indirect gag orders have ordinarily rested their decisions on determinations of whom the restraining orders specifically name. As stated in *Dow Jones*:

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130. *Id.* at 1237.

131. *Id.* at 1236.

132. For another example of the merging of these two concepts, see *Connecticut Magazine v. Moraghan*, 676 F. Supp. 38, 42 (D. Conn. 1987) (An order restraining extrajudicial comment by counsel "constitutes a prior restraint on the right to gather news and derivatively on publication.").

133. Emerson, *supra* note 20, at 648 (emphasis added).

134. See *infra* text accompanying notes 173-77.

"[T]here is a fundamental difference between a gag order challenged by the individual gagged and one challenged by a third party; an order objected to by the former is properly characterized as a prior restraint, one opposed solely by the latter is not."<sup>135</sup> This rationale plainly favors persons who actually possess specific information that they wish to disseminate.

This position builds on the notion that because an order does not gag the press *per se*, no restraint on dissemination takes place, and there is thus no prior restraint. In a formal sense, one cannot deny this proposition. An indirect gag order does not prevent the press from publishing whatever information it can obtain. The order does not prohibit the press from attending the trial and reporting on those proceedings. It does not preclude the press from engaging in a scavenger hunt and reporting whatever information it can dig up.<sup>136</sup> It does not even forbid the press from questioning the trial participants.<sup>137</sup> To the formalist, this absolute freedom to disseminate what the press has gathered hardly constitutes a prior restraint on publication.

The formalistic approach is consistent with the "individual self-fulfillment" theory of the first amendment, which asserts that "the free speech clause protects not a marketplace but rather an arena of individual liberty from certain types of governmental restrictions."<sup>138</sup> In other words, dissemination of "[s]peech is protected not as a means to a collective good but because of the value of speech conduct to the individual."<sup>139</sup> From the formalist's point of view, it is immaterial that an order restraining trial participants indirectly stifles expression in the marketplace. To reach the point of unconstitutionality, an order must restrain "individual liberty," a situation occurring only when the order prohibits the individual from disseminating information within his knowledge.

## 2. THE REALISTIC PERSPECTIVE

The formalist's stringent approach may be attacked on two grounds. First, if the critical distinction turns on *whom* the gag order

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135. *In re Dow Jones & Co.*, 842 F.2d 603, 609 (2d Cir.), *cert. denied*, 109 S. Ct. 377 (1988).

136. See Sack, *supra* note 57, at 420.

137. See *Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1446 (9th Cir. 1986).

138. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 785 (1988) (suggesting "freedom of speech" may be "an end in itself, an expression of . . . the sort of persons we wish to be"); Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 424-26 (1980) (summarizing Baker's theme).

139. Baker, *supra* note 138, at 966.

restrains, then it is a straw argument to maintain that the press does not, in fact, fall into that category. Because an indirect gag order effectively gags the press, it constitutes *de facto* prior restraint. The second argument shifts the focal point from *who* is restrained to *what* is restrained. Either way, the voice of reality speaks loud and clear.

a. De Facto Prior Restraint

To the realist, the formalistic argument collapses at the threshold. Although the literal terms of an indirect gag order only vicariously affect the press,<sup>140</sup> that is far from the practical result.<sup>141</sup> No doubt, trial courts issue indirect restraining orders in order to prevent the news media from publicly disseminating guarded information.<sup>142</sup> Thus, the real and intended casualty of an indirect gag order is undeniably the press. If the saving distinction turns on whom the order affects, then the media, as the true victim of such an order, should be saved. In short, because an indirect gag order effectively restrains the media in advance of publication, such an order constitutes a *de facto* prior restraint, in spite of the precise terms of the gag order.<sup>143</sup>

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140. Even if one assumes that an indirect gag order only indirectly harms the press, the press may forcefully argue that a literal interpretation of the first amendment forbids any abridgement whatsoever of the freedom of the press. By definition, "[t]o 'abridge' means not merely to forbid altogether, but to curtail or to lessen." Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 111 (1982). Consequently, if a court determines that a gag order curtails the media's ability to publish in any way, even indirectly, then the gag order would constitute an impermissible violation of the first amendment. Cf. M. NIMMER, *supra* note 31, § 4.07, at 4-33 ("State action which does not directly curtail speech rights may nevertheless be held invalid if abridgment" results.).

141. See SENATE REPORT, *supra* note 72, at 7 ("While the restriction upon the press is an indirect one, its tendency to cut off news at the source may have the same practical effect as the imposition of a prior restraint."); cf. *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950) (Indirect restraints on speech have the "same coercive effect upon the exercise of First Amendment rights" as direct injunctions.).

142. The plain language of a typical restraining order proves this point. See, e.g., *In re Dow Jones & Co.*, 842 F.2d 603, 606 (2d Cir.) (order prohibited trial participants from making extrajudicial statements about the case "to any person associated with a public communications media, or . . . that a reasonable person would expect to be communicated to a public communications media"), *cert. denied*, 109 S. Ct. 377 (1988).

143. To fit into the prior restraint rubric, this argument must presume the availability of a willing speaker. Without that link, an indirect gag order challenged by the media merely restrains hypothetical dissemination. This is not a high hurdle, however, because the very existence of a gag order presupposes the presence of willing speakers. See *Dow Jones*, 842 F.2d at 607 ("Without [willing speakers] there would be no need for a restraining order; it would be superfluous."). But see *In re New York Times Co.*, 878 F.2d 67, 68 (2d Cir. 1989) (vacating gag order because trial court failed to identify willing speaker). Obviously, the first amendment does not compel a source to speak with the media. Cf. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (First amendment freedoms include the "right to refrain from speaking at all."). Consequently, if a trial participant refuses an interview, the press has "no recourse to relief

The *Dow Jones* analysis<sup>144</sup> represents the antithesis of the de facto prior restraint theory. In that case, the court's holding turned precisely on *whom* the order "gagged."<sup>145</sup> Because the order did not by its terms restrain the press from disseminating information, it did not constitute a prior restraint.<sup>146</sup> From the realist's perspective, such a decision irresponsibly ignores the substantive result of the restriction.<sup>147</sup> To escape the formalist's shallow methodology, the realistic approach mandates consideration of the practical effect of a challenged restriction, and thereby protects all persons who have indeed been repressed.

b. Prior Restraint of Expression: Shifting the Focus  
from "Who" to "What"

Up to this point, both the formalist's approach and the realist's de facto prior restraint approach have regarded the target of the restraint as determinative. Arguably, however, the focal point of analysis would more accurately fall not on *whom* the gag order restrains but on *what* it restrains. That is, rather than charging that a particular order acts as a prior restraint on the speech of *someone*, this approach would hold that the order acts as a prior restraint of *expression* in general.<sup>148</sup> This argument effectively places collective expression on a constitutional pedestal.<sup>149</sup> In sum, this theory condemns indirect gag orders as unconstitutional restraints of valuable expression, regardless of who actually possesses the information.<sup>150</sup>

Supreme Court opinions contain ample references to the protection of expression in general, as opposed to the protection of speakers alone. In *Near v. Minnesota ex rel. Olson*,<sup>151</sup> the seminal American case on the prior restraint doctrine,<sup>152</sup> the Court considered whether

based upon the first amendment." *Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1447 (9th Cir. 1986).

144. *In re Dow Jones & Co.*, 842 F.2d 603 (2d Cir.), *cert. denied*, 109 S. Ct. 377 (1988).

145. See *supra* text accompanying notes 99-100.

146. See *id.*

147. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931) (analyzing first amendment restriction with "regard to substance and not to mere matters of form").

148. The petitioners in *Dow Jones* advanced this argument before the United States Supreme Court on petition for a writ of certiorari. See Brief for Petitioners at 11-14, *Dow Jones & Co. v. Simon*, 109 S. Ct. 377 (1988) (No. 88-229) [hereinafter *Petitioners' Brief in Dow Jones*].

149. See *infra* note 162.

150. This is a particularly potent argument for the press because the validity of the concomitant rights to gather news and to receive information does not then determine the outcome. See *infra* note 162.

151. 283 U.S. 697 (1931).

152. See *Emerson, supra* note 20, at 654.

"restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed."<sup>153</sup> *Nebraska Press Association v. Stuart*<sup>154</sup> also regarded prior restraint as an invidious threat against expression in general. Specifically, Chief Justice Burger stated: "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."<sup>155</sup> Additionally, the Court sanctioned the widely recognized metaphor that while the threat of subsequent punishment "'chills' speech, prior restraint 'freezes' it at least for the time."<sup>156</sup> Despite these statements from the Supreme Court, courts addressing the indirect gag order issue have not uniformly treated protection of the message in the same way that they have treated protection of the source.<sup>157</sup>

### III. ADDITIONAL STRANDS OF ANALYSIS: THE RIGHT TO GATHER AND THE RIGHT TO RECEIVE INFORMATION

Prior restraint analysis in the context of indirect gag orders would be amiss absent a consideration of the "right to know" strands of the first amendment. The right to know comprises the right to gather news and the right to receive communications.<sup>158</sup> Professor Emerson explained the process vividly: "Together [the rights to gather and to receive information] constitute the reverse side of the coin from the right to communicate. But the coin is one piece,

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153. *Near*, 283 U.S. at 713.

154. 427 U.S. 539 (1976).

155. *Id.* at 559 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near*, 283 U.S. at 697; *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454 (1907)).

156. 427 U.S. at 559 (citing A. BICKEL, *supra* note 30, at 61). Even in cases in which prior restraint is not at issue, courts have recognized that the first amendment primarily protects freedom of expression. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (The "proper question" is not whether the party has a first amendment right, but whether the restriction "abridges expression that the First Amendment was meant to protect.").

157. *See supra* notes 91-118 and accompanying text. At first glance, the imposition of indirect gag orders suggests that the constitutional rights of trial participants are somehow inferior to the rights of journalists. D. GILLMOR & J. BARRON, *supra* note 90, at 529; *see also In re Halkin*, 598 F.2d 176, 195 & n.44 (D.C. Cir. 1979) (viewing order directed only against attorneys and litigants as "less drastic" than order against media). In other words, by issuing restraining orders against parties, attorneys, witnesses, and court personnel, but not against the media, the courts seem to be engaged in a "hierarchical approach to the First Amendment." D. GILLMOR & J. BARRON, *supra* note 90, at 529. The seeming inequity of this situation is illusory, however, because the "hierarchical approach" actually "hurts the press" by drying up its sources. *Id.*

158. *See Emerson, supra* note 138, at 464.

namely the system of freedom of expression."<sup>159</sup>

The right to know becomes more significant when the source is not "in a position to assert his rights."<sup>160</sup> By affording a legal right to know, the recipient of information may assert a first amendment right entirely independent of the speaker.<sup>161</sup> This concept is of obvious import in the indirect gag order context where, in the absence of a right to know, the media's right to communicate is arguably derived from the trial participants' right to speak.<sup>162</sup>

Because the media is "the predominant gatherer and disseminator of information in modern society,"<sup>163</sup> the disposition of its right to know is critical. This issue has provoked a plethora of commentary on the various prongs of the right to know.<sup>164</sup> Consequently, this Comment does not investigate all the nuances of the constitutional right to know; rather, it addresses the way in which the right to know is implicated when courts issue indirect gag orders.

#### A. *The Right to Receive Information*

The first prong of the constitutional right to know has been identified as the right to receive information.<sup>165</sup> Although the concept has not yet been clearly formed, it deserves brief mention here in terms of the media's right to receive information from trial participants.

Significantly, cases addressing the right to receive information have determined that the right exists even when potential speakers have been unable or unwilling to assert a constitutional right to

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159. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 2; see also Kleindienst v. Mandel, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting) ("The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin.").

160. Emerson, *supra* note 159, at 2.

161. *Id.*

162. See, e.g., *In re Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir.), *cert. denied*, 109 S. Ct. 377 (1988). The "right to know" theory does not apply to this analysis if one views prior restraint as constraining expression rather than merely restraining "gagged" individuals. See *supra* notes 148-57 and accompanying text. This is the difference: If prior restraint is unconstitutional because it restrains expression, then the media's news-gathering rights are irrelevant because the media may claim first amendment infringement regardless of any news-gathering rights; if prior restraint pertains to the protection of informed sources, however, then the news-gathering right is instrumental to informing the media and thereby permitting a claim of prior restraint on dissemination.

163. Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1506 (1974).

164. A sampling of that commentary includes BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482 (1980); Emerson, *supra* note 159; Note, *What Ever Happened to "The Right to Know"? Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111 (1987).

165. See Emerson, *supra* note 159, at 2.

speak.<sup>166</sup> In the indirect gag order context, willing speakers will often tactically forgo challenging such orders. For example, a prosecutor opposing the imposition of a gag order will not vigorously argue for freedom of speech in fear that the judge might perceive the argument, notwithstanding the legitimacy of the claim, as a request to try the case on the courthouse steps.<sup>167</sup> Likewise, defendants "may be loath to challenge an order unrelated to guilt or acquittal before the same judge who will be presiding over a trial at which their liberty and property will hang in balance."<sup>168</sup> In these situations, the media could conceivably argue that it has a right to receive speech regardless of the trial participants' unwillingness to challenge the restraining order.

Despite the seeming appropriateness of these challenges, the judiciary has rejected the correlative right to receive speech in the indirect gag order setting. Contradicting the very tenets of the right to receive information, the *Dow Jones* court held that the right to receive speech "is entirely derivative of the rights of the trial participants to speak."<sup>169</sup> This blanket statement, conspicuously unsupported by any authority, flies in the face of Supreme Court doctrine that has affirmatively upheld the right to receive information apart from the right to speak.<sup>170</sup>

Although the press could arguably rest solely on the right to receive information, such reliance would not completely protect its interests. The mere "right to read, to listen, to see, and to otherwise receive communications"<sup>171</sup> does not reach far enough to accommodate the media's intentions. Indeed, the media's primary purpose is to relate what it receives to the public. To that end, the second prong of the right to know, the right to gather news "as a basis for transmitting ideas or facts to others,"<sup>172</sup> constitutes the better model for analyzing the indirect gag order issue.

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166. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (statute banning price advertisements by pharmacists struck down upon challenge by consumers, not pharmacists); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (acknowledging right to hear foreign lecturer even though foreigner could not assert first amendment speech rights); *Lamont v. Postmaster*, 381 U.S. 301, 307 (1965) (upholding citizens' right to receive communist literature without government interference).

167. Petitioners' Brief in *Dow Jones*, *supra* note 148 at 14 n.7.

168. *Id.*

169. *In re Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir.), *cert. denied*, 109 S. Ct. 377 (1988).

170. See cases cited *supra* note 166.

171. Emerson, *supra* note 159, at 2.

172. *Id.*



### B. *The Right to Gather News*

As noted earlier, courts often use the concepts of prior restraint and restraint on news-gathering interchangeably.<sup>173</sup> The two concepts are distinct, however, as demonstrated by Professor Emerson's coin metaphor.<sup>174</sup> The "system of freedom of expression"<sup>175</sup> comprises the right to communicate (which is encroached when a restriction acts as a prior restraint) on one side of the coin and the right to know (which is violated when an order denies the right to gather news) on the other side of the coin. Yet courts that refer to "prior restraint on the gathering of news"<sup>176</sup> are not far off the mark. If one views prior restraint as an advance restraint on expression in general,<sup>177</sup> then a restriction on news-gathering, which is a component of the "system of freedom of expression," necessarily impinges on that communicative process. Nevertheless, in the communicative process, news-gathering serves as the predecessor of expression and not as expression itself. Therefore, it is preferable to reserve the term "prior restraint" only for advance restrictions on expression—and not for constraints on news-gathering. Notwithstanding this terminological distinction, the right to gather news still greatly impacts upon prior restraint analysis.

The Supreme Court has repeatedly recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>178</sup> This press freedom is most frequently asserted as a right of access to places or persons.<sup>179</sup> In particular, cases dealing with access to trial and access to prisoners are most analogous to the circumstances that arise with an indirect gag order.

#### 1. ACCESS TO TRIALS: *Richmond Newspapers, Inc. v. Virginia*

In the landmark right of access case, *Richmond Newspapers, Inc. v. Virginia*,<sup>180</sup> the Supreme Court concluded that the press and the

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173. See *supra* notes 131-33 and accompanying text.

174. See *supra* note 159 and accompanying text.

175. Emerson, *supra* note 159, at 2.

176. *Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986).

177. See *supra* notes 148-57 and accompanying text.

178. *Pell v. Procunier*, 417 U.S. 817, 833 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), quoted in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

179. The Supreme Court has indicated that the terms "right of access" and "right to gather information" are synonymous. See *Richmond Newspapers*, 448 U.S. at 576 ("It is not crucial whether we describe this right . . . as a 'right of access,' . . . or a 'right to gather information' . . ."). But see M. NIMMER, *supra* note 31, § 4.08[B], at 4-42 (suggesting that the terms may have different meanings in different contexts). This Comment uses "right of access" and "right to gather information" interchangeably.

180. 448 U.S. 555 (1980).

public have a first amendment right to attend criminal trials.<sup>181</sup> The case produced six different opinions upholding the right of access to criminal trials;<sup>182</sup> consequently, the scope of *Richmond Newspapers* remains an open question. Nevertheless, several themes emerge from the amalgam of opinions that acknowledge the right of access to criminal trials.

First, the plurality recognized that open criminal trials significantly predated the enactment of the first amendment.<sup>183</sup> Accordingly, the Bill of Rights, which "was enacted against the backdrop of the long history of trials being presumptively open,"<sup>184</sup> protects the public's right to view criminal trials. In short, the Constitution's incorporation of history coupled with "the favorable judgment of experience" gave justifiable credence to the Court's new-found right of access.<sup>185</sup>

Second, the Court noted that public trials assume a crucial oversight function in the administration of justice.<sup>186</sup> With the availability of instantaneous and widespread news coverage, firsthand observation of the system now conveniently rests with the media as "surrogates for the public."<sup>187</sup> Thus, the media acts on behalf of the public to assure the integrity of court officials and the judicial process. As reiterated by both Chief Justice Burger and Justice Brennan: "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."<sup>188</sup>

Despite the favorable outcome for first amendment rights, the press may have difficulty analogizing *Richmond Newspapers* to indirect gag order cases. Moreover, by deciding only the narrow issue of access to criminal trials, the Court has yet to determine what standard

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181. Although no opinion emerged for the Court, a seven-to-one majority concurred in the judgment approving the first amendment right of access to criminal trials. *Id.* at 580 (Burger, C.J., joined by White and Stevens, JJ.); *id.* at 598 (Brennan, J., joined by Marshall, J., concurring in judgment); *id.* at 599 (Stewart, J., concurring in judgment); *id.* at 604 (Blackmun, J., concurring in judgment).

182. Chief Justice Burger authored the main opinion. Justices White and Stevens filed concurring opinions. Justices Brennan, Stewart, and Blackmun wrote opinions concurring in the judgment. *Id.* at 555.

183. *Id.* at 575.

184. *Id.*

185. *Id.* at 589 (Brennan, J., concurring in judgment).

186. *Id.* at 569 (plurality); *id.* at 596-97 (Brennan, J., concurring in judgment).

187. *Id.* at 573 (plurality).

188. *Id.* at 569 (plurality) (quoting 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827)); *id.* at 596 (Brennan, J., concurring in judgment) (same); see SENATE REPORT, *supra* note 72, at 1; 3 W. BLACKSTONE, *COMMENTARIES* \*372; 1 J. BRYCE, *THE AMERICAN COMMONWEALTH* 514 (rev. ed. 1931); M. HALE, *HISTORY OF THE COMMON LAW OF ENGLAND* 344 (6th ed. 1820).

applies in other situations in which the press seeks the right to gather news.<sup>189</sup> The Court further noted that the first amendment right to gather news is not "absolute."<sup>190</sup> Finally, the Court's reliance on the historical underpinnings of the open trial may not carry over to the asserted right to interview trial participants. On the contrary, "[n]owhere in the extensive history of the public nature of criminal trials related in *Richmond Newspapers* can be found right of access protection for interviewing trial participants."<sup>191</sup>

The press may effectively rebut these pitfalls by arguing that it has a duty, as the public's "watchdog" of the governmental process, to interview trial participants and to report acquired information to the public. Significantly, *Richmond Newspapers* permits the press to lawfully attend and report on trial proceedings in its role as liaison to the public.<sup>192</sup> As a result, the eventual issue is whether denial of media access to trial participants so impairs the media's oversight function that an expansion of the *Richmond Newspapers* holding to the indirect gag order context becomes necessary.

To the press, the right to attend and report on trial events is "illusory"<sup>193</sup> without interpretation of those events by trial participants. Clearly, an indirect, noninterpretative trial record cannot effectively substitute for the intrinsic communicative qualities of face-to-face exchange.<sup>194</sup> Moreover, the "wall of secrecy" transforms the right to attend trial into nothing more than "a method by which the government uses the press as a conduit to transmit the official line."<sup>195</sup> Surely, situations arise in which crucial information may be obtained only by interviewing trial participants and not solely by attending a trial. For example, an attorney who is concerned about a particular judge's trial management may not, under risk of contempt for viola-

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189. See M. NIMMER, *supra* note 31, § 4.09[B], at 4-44.

190. *Richmond Newspapers*, 448 U.S. at 581 n.18; cf. *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.").

191. See *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 256, 678 P.2d 431, 441 (1984).

192. See *Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1446 (9th Cir. 1986); *KPNX Broadcasting*, 139 Ariz. at 254, 678 P.2d at 439. But cf. *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 80 (1964) (Black, J., concurring) ("First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop.").

193. *KPNX Broadcasting*, 139 Ariz. at 259, 678 P.2d at 444 (Feldman, J., dissenting).

194. Cf. *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (recognizing that "alternative means of access" to certain information may not share the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning").

195. *KPNX Broadcasting*, 139 Ariz. at 259, 678 P.2d at 444 (Feldman, J., dissenting). In his dissent in *KPNX Broadcasting*, Justice Feldman also quipped that the right to attend trial "is the same right that government has graciously given the press in totalitarian societies such as Argentina, China and the Soviet Union." *Id.*

tion of a gag order, convey that concern until the trial ends. Although certain remedial measures may be available following trial, the prompt reaction that news coverage elicits cannot be lightly dismissed.<sup>196</sup>

Despite the media's claims, valid arguments to the contrary compel serious consideration. In particular, one must question whether fulfillment of the "watchdog" role truly requires the additional information obtained from interviewing trial participants. Before a news agency can effectively act as a "watchdog," it must perform as a business. Given the latter mission, the financial necessity to sell its product conceivably taints the media's desire to interview trial participants. The insatiable curiosity of the American public thus has the journalist walking a fine line between responsible journalism and sensational, yet profitable, news coverage.<sup>197</sup> In light of the media's questionable intentions, the risk of publishing inadmissible information arguably weighs against finding a news-gathering right to interview trial participants.<sup>198</sup>

## 2. ACCESS TO PRISONERS: *Pell v. Procunier* AND *Saxbe v. Washington Post Co.*

The prisoner access cases involved concerns of the same type raised in indirect gag order cases. In both *Pell v. Procunier*<sup>199</sup> and *Saxbe v. Washington Post Co.*,<sup>200</sup> the Supreme Court faced the issue of whether prison regulations prohibiting interviews between journalists and specifically designated inmates violated the first amendment.<sup>201</sup> The facts in the cases were virtually the same, except that in *Pell*, the

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196. *But see* Gellhorn, *The Right to Know: First Amendment Overbreadth?*, 1976 WASH. U.L.Q. 25, 27 ("A gag order does not forever block critical comment upon the prosecution or the judge. The crucial question is whether . . . the health of society is furthered by the speediest possible news reporting.").

197. The Warren Commission, in its report of the media's conduct during the days following President Kennedy's assassination, admonished the press for choosing the sensational route: "[T]he public's] . . . curiosity should not have been satisfied at the expense of the accused's right to a trial by an impartial jury. The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime." REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 219, 240 (1964). In retrospect, theorists now believe that "as a result of the conduct of the Dallas police and the communication media . . . , [Oswald] could not have had a fair trial anywhere in the United States." A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 315 (1967) (quoting the American Civil Liberties Union without citation).

198. *See* Respondents' Brief in *Dow Jones*, *supra* note 85, at 14 (The restraining order merely prohibits the media from gathering "sensational characterizations and matters beyond the public record"; the "public will not be cheated by that limitation.").

199. 417 U.S. 817 (1974).

200. 417 U.S. 843 (1974).

201. *Id.* at 844-45; *Pell*, 417 U.S. at 819.

Court reviewed a state regulation<sup>202</sup> while in *Saxbe*, the Court reviewed a federal regulation.<sup>203</sup>

The disputes arose when journalists were denied access to specific prisoners who were willing to be interviewed.<sup>204</sup> In denying the media's first amendment challenge,<sup>205</sup> the Court found the availability of alternative news-gathering mechanisms determinative.<sup>206</sup> Specifically, the regulations "accorded full opportunities to observe prison conditions" and to "speak about any subject to any inmates whom they might encounter."<sup>207</sup> The Court's rationale sounds similar to the reasoning in some of the indirect gag order cases that stress the media's full opportunity to attend and report on a trial, despite lack of access to trial participants.<sup>208</sup>

At first glance, *Pell* and *Saxbe* appear to cut against the media's claim for first amendment protection from an indirect gag order. Professor Nimmer's provocative distinction between non-speech and anti-speech restrictions<sup>209</sup> suggests a different result, however. According to Professor Nimmer, a non-speech restriction occurs when "the mere operation of the communicative process regardless of the message" threatens the protected interest.<sup>210</sup> More specifically, a non-speech restriction attaches "if the interests asserted are injured not by the subsequent publication of the information gathered, but rather by the very presence of the information gatherer."<sup>211</sup> On the other hand, an anti-speech restriction arises when the content of the message itself threatens the competing interest.<sup>212</sup>

The prisoner access cases demonstrate how the non-speech model functions. The regulations in *Pell* and *Saxbe* purported to

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202. *Pell*, 417 U.S. at 819.

203. *Saxbe*, 417 U.S. at 844.

204. *Id.*; *Pell*, 417 U.S. at 820-21.

205. *Saxbe*, 417 U.S. at 850; *Pell*, 417 U.S. at 835. For criticism of this holding, see M. NIMMER, *supra* note 31, § 4.09[B], at 4-48; Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166 (1975).

206. *Saxbe*, 417 U.S. at 847-48; *Pell*, 417 U.S. at 830. The Court was also persuaded by earlier doctrine holding that the press does not have "a constitutional right of special access to information not available to the public generally." *Id.* at 833-34 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972)). This argument does not apply in the indirect gag order setting because the press does not seek to be treated differently than the general public. Indeed, if the trial participants were free from the gag order, the press and public would have equal opportunity to gather information.

207. *Pell*, 417 U.S. at 830; *see also Saxbe*, 417 U.S. at 847.

208. *See, e.g., Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1446 (9th Cir. 1986).

209. M. NIMMER, *supra* note 31, § 4.09[B], at 4-45.

210. *Id.* at 4-46.

211. *Id.* at 4-56.

212. *Id.* at 4-46.

maintain discipline within the prison.<sup>213</sup> Because unrestrained access to prisoners would jeopardize that purpose regardless of the content of the subsequent dissemination, the regulations operated as non-speech restrictions and were thus presumptively valid.<sup>214</sup> This theory suggests that the Court decided *Pell* and *Saxbe* correctly.

The characteristics delineating the dichotomy between non-speech and anti-speech indicate that indirect gag orders constitute anti-speech restrictions. A judge typically issues a gag order in the interest of a defendant's right to a fair trial. The media's access to trial participants does not independently threaten this interest. Rather, gag orders are issued to prevent the press from publishing information that judges would deem prejudicial at trial.<sup>215</sup> In short, only the message that might be communicated—not the communicative process itself—threatens the right to a fair trial.

The constitutionality of an anti-speech restriction depends upon whether the first amendment provides protection for the content of the communication.<sup>216</sup> That is, the "right to gather information is as strong or as weak as the right to communicate the information once it has been gathered."<sup>217</sup> Consequently, the *Nebraska Press Association v. Stuart* decision,<sup>218</sup> which dealt with the media's right to disseminate previously gathered information, should govern the media's right to gather information from trial participants. Under the *Nebraska Press* scheme, gag orders must survive a tripartite balancing test in order to validate restraints on dissemination.<sup>219</sup> Accordingly, if a court concludes that news coverage might impinge upon the defendant's right to a fair trial, if less restrictive alternatives are completely unavailable, and if the restraining order would effectively preserve the integrity of the trial,<sup>220</sup> then the right to communicate evaporates<sup>221</sup> and its con-

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213. See *Saxbe*, 417 U.S. at 848-49; *Pell*, 417 U.S. at 831-32; M. NIMMER, *supra* note 31, § 4.09[B], at 4-46.

214. M. NIMMER, *supra* note 31, § 4.09[B], at 4-46.

215. See *supra* notes 11-13 and accompanying text.

216. M. NIMMER, *supra* note 31, § 4.09[B], at 4-53.

217. *Id.* at 4-54.

218. 427 U.S. 539 (1976).

219. *Id.* at 562.

220. *Id.*

221. Contrary to this hypothetical, in all likelihood, a restraining order would not clear all three hurdles. See STANDARDS FOR CRIMINAL JUSTICE, Fair Trial and Free Press, Standard 8-3.1 commentary at 8-29 (1978) (The drafters noted that the "circumstances under which prior restraints could constitutionally be imposed are extremely limited" after *Nebraska Press*; consequently, the ABA's decision to categorically prohibit direct restraints on the press is "neither radical nor unwarranted."); L. TRIBE, *supra* note 138, § 12-11, at 858-59 (suggesting that the Court has "announced a virtual bar to prior restraints on reporting of news about crime"); Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 497, 504 (1977) ("[I]t seems difficult

comitant right to gather news becomes superfluous. Conversely, if a court finds that the press has a right to publish trial information that is already in its possession, then an anti-speech restriction prohibiting the press from access to trial participants would violate first amendment principles.<sup>222</sup>

#### IV. CONCLUSION

The emerging popularity of indirect gag orders has essentially prompted an end run around *Nebraska Press*. With the narrow holding of *Nebraska Press* firmly in grip, trial judges invite reversals when they issue orders directly restraining the press. The import of the *Nebraska Press* holding, however, is rendered meaningless by what appears to be judicial "magic." By pulling the indirect gag order out of the judge's hat, courts diminish the significance of *Nebraska Press*. When faced with a high profile trial, judges can now effectively muzzle the press, via an order restraining the trial participants, without employing the prohibited direct gag order. In this manner, courts avoid blatant violations of *Nebraska Press* while magically achieving the same suppressive result that *Nebraska Press* rejected. Unlike magicians, however, courts should not be in the business of creating illusion.

The Supreme Court viewed the direct restraint on publication as "one of the most extraordinary remedies known to our jurisprudence."<sup>223</sup> This position should not be undercut by the wave of a wand. Rather, courts should evaluate indirect gag orders with the same standards that are applied to direct gag orders. Initially, judges must examine the probable nature and extent of press activity.<sup>224</sup> In addition, judges must rigorously explore other alternatives, such as change of venue, continuance, in-depth voir dire, and sequestration of jurors,<sup>225</sup> before they employ the ultimate safety device. Finally, courts must scrutinize the efficacy of restraining orders in the particular circumstances of each case.<sup>226</sup>

Understandably, the *Nebraska Press* Court declined to decide the

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to believe that any other case will provide an exception to the rule against prior restraints in fair trial/free press cases."'). But see Sack, *supra* note 57, at 414 (arguing that the Court's balancing approach insufficiently protects the press).

222. Cf. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.").

223. *Nebraska Press*, 427 U.S. at 562.

224. *Id.*

225. *Id.* at 563-64.

226. *Id.* at 562.

propriety of indirect gag orders on the facts presented. But when it denies certiorari to cases that do embrace the proper facts,<sup>227</sup> the Supreme Court risks the complete evisceration of *Nebraska Press*. One must consider the legitimacy of obliterating constitutional doctrine with a mere gossamer. In any event, the Supreme Court should accept the next opportunity to hear the issue. Only an unequivocal pronouncement from the highest court in the land will permit lower courts to issue indirect gag orders with integrity.

SHERYL A. BJORK

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227. See, e.g., *Dow Jones & Co. v. Simon*, 109 S. Ct. 377 (1988).